unsupported assertions in plaintiff's opposition do not allege the sort of specific intent necessary to state an interference claim. Thus plaintiff has no standing to assert either of its tort claims as a matter of law. Fineman v. Armstrong World Indus., Inc., 774 F. Supp. 225, 253 (D.N.J. 1991) (plaintiff must prove "at least one of two elements: specific intent or the status of a party to the contract").

As for the antitrust claims, plaintiff and its experts have fundamentally misconstrued, and therefore failed to undertake, the analysis necessary to prove an antitrust violation. Pappas focuses exclusively on the alleged effects of the Pac-10's agreements on the ability of local broadcasters to televise local team games, and the ability of local viewers to see those games, and completely ignores the marketwide competitive impact that is the foundation for any antitrust claim. Because plaintiff has failed even to attempt this core analysis, the rest of its discussion is window dressing, and its antitrust claims fail as a matter of law.

I. PAPPAS CANNOT PROVE ITS TORT CLAIMS

A. Plaintiff Has Failed to Prove that Contracts Ever Existed for the Live Broadcast of the Two FSU Games.

Plaintiff's own case makes it clear -- "Without mutual assent, there is no contract." Merced County Sheriff's Employee's Assn. v. County of Merced, 188 Cal. App. 3d 662, 670 (1987). Here, everyone personally involved in the discussions that led to the purported agreements to broadcast the FSU-OSU and FSU-WSU games live agrees there never was mutual assent (or any assent) to such an agreement. Mike Corwin (OSU) and Harold Gibson (WSU) both testified in their depositions, as they had in their declarations, that they believed FSU contemplated, and they agreed only to, a delayed telecast. Deposition of Mike D. Corwin ("Corwin Depo.") at 43; Deposition of Harold Gibson ("Gibson Depo.") at 32-33. Scott Johnson (FSU) sought a live telecast, but he acknowledges he didn't tell anyone that, either on the telephone or in his follow-up letters. Memorandum in Support of the Pac-10's Summary Judgment Motion ("Pac-10's Brief") at 6-7; Deposition of Scott Johnson ("Johnson Depo.") at 204. Moreover,

Johnson testified, as he had in his declaration, that he said nothing to either Corwin or Gibson that would have indicated that he sought a live telecast. Johnson Depo. at 237.[1] The consistent and uncontroverted testimony by all parties to the discussions is dispositive. Merced County, 188 Cal. App. 3d at 670 ("'There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and . . . neither party knows or has reason to know the meaning attached by the other.'") (quoting Restatement 2d Contracts § 20).

So what is the significant probative evidence that plaintiff claims could convince a jury to conclude otherwise? Primarily, it is the fact that KMPH had previously (i.e., some years earlier) telecast live to Fresno one FSU-WSU and two FSU-OSU games. Plaintiff implies that a practice existed between Johnson, Corwin and Gibson concerning football telecasts, such that even though they all deny entering into contracts, the Court should force contracts on them.

In fact, Johnson had no prior experience dealing with either Corwin or Gibson relating to televising football games. Johnson Depo. at 205; Gibson Depo. at 30. Neither Corwin nor Gibson was involved in making arrangements for the previous games. Johnson Depo. at 26, 205; Corwin Depo. at 48; Gibson Depo. at 30-31. Johnson himself did so for only one of them. Johnson Depo. at 14-20, 135; compare Opp. Brief at 13:9-10; 17:11-17; 17:25-18:3. It is therefore absurd for plaintiff to argue that Corwin and Gibson must have been talking about live broadcasts, despite their testimony that they weren't, on the basis of a history neither had experienced. Plaintiff

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[1] Johnson also admits that FSU never requested, or was granted, written permission by WSU's athletic director to do a live telecast, as the schools' game contract required. Johnson Depo. at 209; accord, Declaration of James Livengood ¶ 3, Ex. A, at 2.

cannot prove what Corwin and Gibson knew or should have known based on events they had nothing to do with and prior dealings they never had.[2]

As for Johnson individually, it is true he contemplated live telecasts (Opp. Brief at 11:23-24), and that he told KMPH (mistakenly) that he had received permission for live telecasts (Opp. Brief at 11:25-26; 13:1). But that has nothing to do with whether Corwin and Gibson agreed to live telecasts, and the undisputed evidence is that they did not. In any event, Johnson has freely acknowledged he made a mistake, and no amount of evidence that Johnson acted on his mistake can turn it into a contract binding OSU and WSU.[3]

There was no agreement to live telecasts, and the Pac-10 could not as a matter of law have interfered with something that did not exist.

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[2] Pappas also points out that Johnson's letters confirming the 1991 conversations mentioned a reciprocal waiver of rights fees. But that just proves a delayed telecast was understood, for several reasons. First, the OSU-FSU and WSU-FSU games played in Fresno in 1992 (to which the reciprocity applied), were telecast back to Oregon and Washington, respectively, on a delayed basis. Johnson Depo. at 207-08. In addition, WSU (Gibson) initiated the reciprocal rights fee waiver (Johnson Depo. at 136-37), so the fact that it telecast the 1992 game delayed shows that it understood that FSU would do the same. As for OSU, it always telecast its games in the home area on a delayed basis (as it did for the 1992 and 1993 FSU games). Corwin Depo. at 14; Deposition of Dutch Baughman at 45-46. OSU would not have agreed to allow FSU to do something for free OSU wouldn't have done in any event.

[3] It is true that OSU first learned that KMPH intended to do a live telecast when it received Howard Zuckerman's letter in mid-August 1991, a few weeks before the game. Cf. Opp. Brief at 13:2-6; Corwin Decl. ¶ 3; Cowan Decl. ¶ 2. But that only proves that there was a misunderstanding, not an agreement, between Corwin and Johnson in June. Plaintiff's discussion of the Zuckerman letter WSU received (Opp. Brief at 11:27-12:4), is equally unavailing, and also misleading. WSU's athletic director, James Livengood, never even saw the letter (Livengood Depo. at 30-31), and his assistant, Harold Gibson, who did see it, testified that it did not indicate a live telecast (Gibson Depo. at 20-21). The testimony Pappas cites is Livengood's reaction to the letter when presented with it at the deposition. Livengood Depo. at 31.

B. **Pappas Has No Standing To Assert Its Tort Claims**

1. Pappas Could Not Sue for Inducing Breach of the Contracts, Even if They Existed.

Only a party to a contract has standing to sue for inducing its breach. Gold v. Los Angeles Democratic League, 49 Cal. App. 3d 365, 375 (1975); Glass Bottle Blowers Ass'n v. National Bottle Co., 584 F. Supp. 970, 972 (E.D. Pa. 1983); Restatement 2d, Contracts § 766, comment p. Plaintiff, no doubt recognizing this, asserts, with no legal authority, that "FSU was acting as agent for KMPH concerning the September 1991 games." Opp. Brief at 13:18-19; see also id. at 18:10-11. Plaintiff's conclusory assertion has no factual support either, since the contract between KMPH and FSU provides that each party is "an independent contractor," (Markham Decl. Ex. B at Addendum p.1), not an agent.[4] Accord, id. at ¶ 8.

Plaintiff purports to cite language from the contract establishing an agency relationship, but it is very misleading. The complete clause that plaintiff cites from is as follows:

> M. ACCESS AND ADMISSION TO EVENTS
>
> * * *
>
> 2. Away Events: the Sports Information Office for [FSU] shall make all arrangements with the host institution

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[4] While the two "'are not necessarily mutually exclusive,'" an independent contractor is an agent only where he is "'subject to another's control, except with regard to his physical conduct.'" Mottola v. R.L. Kautz & Co., 199 Cal. App. 3d 98, 108 (1988) (emphasis in original) (citation omitted); Restatement 2d, Agency § 14N. There is no allegation that KMPH controlled Johnson's activities, nor could there be.

In addition, the contract expressly disclaims that KMPH is FSU's agent. Id. at 11. It does not specify whether the reverse could be true, presumably because no one ever considered that possibility until Pappas made it up now. It is clear from the terms of the contract that KMPH is acting as an independent contractor for FSU. Indeed, KMPH is referred to as "Station-Contractor." E.g., id. at Addendum, p.1. Plaintiff's blithe after-the-fact attempt to turn the contract on its head and make FSU KMPH's agent is disingenuous, at best. See text, below.

> for out-of-town games to provide twenty (20) working press credentials and access to game site for production equipment and talent personnel.

Id. at 6 (emphasis added). This clause recites a contractual obligation to obtain press passes and stadium access; it doesn't create an agency, much less an agency to do something (acquire television rights) unrelated to the obligation.[5] Plaintiff's conclusory and misleading assertions do not establish an agency; thus it has no standing to assert its interference with contract claim.

2. Plaintiff Cannot Prove Specific Intent to Interfere with the KMPH-FSU Relationship

Pappas has failed to distinguish DeVoto v. Pacific Fid. Life Ins. Co., 618 F.2d 1340 (9th Cir.), cert. denied, 449 U.S. 869 (1980), which is on all fours and governs this case. Pac-10's Brief at 12-14. To make out a claim for tortious interference with prospective economic advantage, plaintiff must prove that the Pac-10 specifically intended to interfere with Pappas' relationship with FSU. See DeVoto, 618 F.2d at 1349.[6]

Plaintiff's entire answer to DeVoto is to assert in conclusory fashion that "the preclusive contracts [between the Pac 10 and broadcasters ABC and PTN] were entered into with the conscious object of interfering with the ability of broadcasters such as Plaintiff to compete." Opp. Brief at 18. There is, however, no evidence whatsoever supporting this allegation, and under Rule 56, plaintiff had the burden to "go beyond the

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[5] FSU's contractual obligation to "try to negotiate" for the waiver of rights fees (Id. at 2) is equally unavailing. FSU did so by agreeing to reciprocate with OSU and WSU (i.e., give up rights fees) in the future. An agent does not pay money out of pocket for the benefit of its principal with no expectation of reimbursement. An independent contractor subject to contractual obligation does.

[6] In its opening brief, the Pac-10 accidentally substituted "Bankers" for "American" in its discussion of DeVoto at page 13, line 16. We regret any confusion this may have caused; the clarification confirms that DeVoto is directly on point.

pleadings" and present evidence of "'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).[7]

In any event, even if this statement were supported by evidence, it would not satisfy DeVoto. Indeed, plaintiff alleges precisely the sort of general intent DeVoto found insufficient as a matter of law:

> Tortious interference requires a state of mind and a purpose more culpable than "intent" . . . . The fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability. Inquiry into motive or purpose of the actor is necessary. * * * Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and limit liability accordingly.

618 F.2d at 1347 (emphasis added); Rickards v. Canine Eye Registration Fdtn., Inc., 704 F.2d 1449, 1455 (9th Cir.), ("Motive or purpose to disrupt ongoing business relationships is of central concern in a tortious interference case, and a strong showing of intent is required to establish liability."), cert. denied, 464 U.S. 994 (1983). "A general intent to interfere or knowledge that conduct will injure the plaintiff's business dealings is insufficient to impose liability." Genetic Systems Corp. v. Abbott Laboratories, 691 F. Supp. 407, 423 (D.D.C. 1988) (citing Rickards, 704 F.2d at 1456). Pappas' unsupported allegation of general intent is as good as it gets for plaintiff, and it is insufficient as a matter of law.

Pappas cannot in any case show that the Pac-10 had specific intent to injure it because it admits that the Pac-10's allegedly "preclusive contracts," which it claims caused its injury (Opp. Brief at 18), "preexisted any attempt by FSU or Plaintiff to

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[7] Nor is there any merit to plaintiff's Rule 56(f) argument. The Pac-10 has already agreed to postpone the hearing on its motion nearly six months to allow the plaintiff to take discovery and it raises no fact issues in this brief that were not raised in its opening brief. Thus Pappas must present evidence, not bare allegations, to avoid summary judgment. See id.

acquire the rights to telecast" the games at issue. Pltf's Response to ABC's Statement of Material Facts, No. 7. Pappas also admits that its right to televise the games was contingent on FSU's obtaining the Pac-10 schools' consent to live telecasts. Opp. Brief at 13. The Pac-10 cannot as a matter of law have specifically intended to interfere with a contract that, even if it ever existed, clearly did not exist at the time the Pac 10 entered into the so-called preclusive agreements.[8]

II. PAPPAS CANNOT PROVE ITS ANTITRUST CLAIMS

The Pac-10 moved for summary judgment early in this case because plaintiff's complaint telegraphed its intention to base its entire antitrust case on a single fact: the natural tendency of television viewers in any single locality to have a heightened preference for watching the games of local teams. We weren't sure, but it appeared that all plaintiff intended to say in this Court was that but for the Pac-10's contracts, a few Pac-10 games not currently televised might be broadcast by local stations attempting to cater to local fan interest. This is intuitively obvious -- and in no event should take 600 hours of purported linear regressions to prove. See Sigouras Decl. ¶¶ 4, 6.[9]

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[8] Finally, reversing its field, Pappas tries to bootstrap its antitrust allegations into a tort claim, arguing that if the Pac-10's contracts are anticompetitive, "Plaintiff was a target of such illegitimate business practices and its state claims must go forward." Opp. Brief at 20. As shown below, Pappas antitrust allegations are independently insufficient as a matter of law, but they cannot save the interference claim in any event. Genetic Systems rejected a nearly identical argument where plaintiff alleged that defendant knew that its "exclusive contract . . . would substantially exclude [plaintiff] from the market." 691 F. Supp. at 423. The Court held, as discussed above, that such allegations of general intent are insufficient, and that "Plaintiff's antitrust claims do not alone excuse the necessity for plaintiff to fulfill the pleading requirements of this independent state law claim." Id.

[9] Plaintiff's "market study" is not only overkill for Pappas' general proposition, it is also badly flawed in its specifics. First, its very foundation is questionable, since plaintiff's statistician admits it "was created to show a gross decrease in the number of exposures on local television." Sigouras Decl. ¶ 8. It accomplishes that goal in part by counting the number of markets in which a game is televised, not the number of games

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It is now clear that we guessed right: plaintiff's case is based exclusively on the premise that the "time period exclusivity" provisions of the Pac-10's agreements occasionally prevent Pappas and other local broadcasters from televising certain games live at certain times.[10] Pappas defines the injury to competition as the "virtual[]

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televised. Id. Thus if ABC shows a Pac-10 or Big Ten game as a regional telecast, it is counted as a "network telecast" seven to ten times; a national telecast is so counted 17 times. (If plaintiff had studied more markets, it could have exaggerated the supposed trend further.) Plaintiff also ignores the distinction between live and delayed telecasts, although it claims the latter are not part of the relevant market. Many of the Pac-10 schools' cablecasters show games delayed, and often more than once in more than one market. For example, a delayed cablecast of an OSU-WSU game might be shown three times in three markets, and counted nine times by plaintiff. Finally, plaintiff's analysis of the so-called decrease in games shown on "local TV broadcast stations" is misleading, because, with the exception of a limited number of network-owned stations, the ABC affiliates that telecast Pac-10 football are "local TV broadcast stations."

Nonetheless, the Pac-10 is willing to assume the truth of Pappas' general proposition for purposes of this motion. On the other hand, we don't wish to ignore reality completely. The relative preferences of viewers between any two games obviously vary depending on the games. Even a die-hard FSU fan may prefer watching a game between contenders for the national championship, and even a fan without much sustained interest in FSU may prefer watching the Bulldogs play an arch-rival than a less meaningful game between national powerhouses. Moreover, it is impossible to generalize about viewer preferences. While fan interest in a team is usually keenest among the local population, many fans in the same population will prefer watching other teams. What we can and do concede is that the greatest pocket of interest in a particular team will generally be in its home community and that, often, that interest will exceed the level of interest in distant teams, even teams of greater nationwide popularity.

[10] To bolster its claims, Pappas prophesies (citing mostly the allegations of its complaint, which of course are not evidence), a monolithic conspiracy between the defendants and other entities to control the market for televising college football, with its ultimate goal to "'siphon'" from the free airwaves "all television sports rights" and make "televised sports increasingly available on a 'pay per view' basis." Opp. Brief at 9-10. Although most of plaintiff's contentions show merely how Pappas, not competition, has purportedly been injured, and are therefore irrelevant (pp. 10-13, below), a few points should be corrected. First, Pappas exaggerates the preclusive effect of the Pac-10's contracts. They do not cover all Pac-10 games (Opp. Brief at 6:15-17), only home games. Declaration of Thomas C. Hansen ¶ 7. Also, ESPN sublicenses games from

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eliminat[ion] [of] broadcast opportunities for local broadcasters" (Opp. Brief at 25:12-13 (emphasis added)), which it claims has resulted in a "decline in the number of Pac-10/Big 10 games available at the lowest tier of free over the air broadcast" (Opp. Brief at 26:7-8 (emphasis added). The only "consumer injury" identified is the allegedly dashed hopes of local viewers to see the local team on television.[11] Opp. Brief at 25.

Given that this, indeed, is the totality of plaintiff's case, a straightforward question of law is presented: is this evidence, by itself, and without any analysis of aggregate, marketwide effects on output, a sufficient basis upon which to conclude that the time period exclusivity provisions unreasonably restrain trade? As a matter of law the answer is no. Localized consumer preferences scarcely inform the antitrust analysis of this case, let alone resolve it.

1. **Harms to Discrete Competitors or Consumers are Not Harms to Competition.**

The fundamental flaw in plaintiff's argument is equating a decrease in the number of locally produced and televised games with a decrease in "output." In a small, legally meaningless sense that is true: if a contract prevents the telecast of a

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Prime Ticket, and thus televises twice per season in place of, not in addition to (Opp. Brief at 8:5), Prime Ticket. Deposition of Thomas C. Hansen at 107-08 (Cripe Decl. Ex. 7). Pappas also overstates the rigidity of the telecast "windows." A telecast, of course, may begin at any time, subject to the approval of the participating schools, not at one of the four times plaintiff specifies (Opp. Brief at 6:6-8). See Declaration of Frank M. Hinman, Ex. A. There is thus much more flexibility than Pappas implies to schedule games to avoid conflicting with the exclusivity periods. Finally, Pappas' conclusory assertion that the Pac-10, a seller of games, has a "joint interest" with the purchasers of games to affect price or output contradicts the facts, the law, basic economic theory and common sense. Pp. 14-15 and n. 15, below.

[11] One can question whether viewers, as opposed to the advertisers that pay for commercial time on football telecasts, are the relevant consumers. We refer to viewers as consumers because, at the very least, they make up the audience advertisers are trying to reach, and there is accordingly a close convergence between advertiser and viewer interests in the context of this case.

particular game, it has suppressed that unit of output. By the same token, if a single competitor is excluded from a market, its unique output is suppressed. But antitrust analysis has never turned on whether a restraint has suppressed a particular unit or source of output, but rather on the aggregate output effects of a restraint throughout that market in which the restraint operates. Pac-10's Brief at 17-20. In fact, the very essence of Rule of Reason analysis is balancing the output enhancing and output restricting features of a restraint to render a judgment as to its net impact. E.g., Continental T.V. v. GTE Sylvania, 433 U.S. 36, 57 n.27 (1977); Dimidowich v. Bell & Howell, 803 F.2d 1473, 1484 (9th Cir. 1986).

Indisputably, the Pac-10's agreements operate throughout broad national or regional markets. They are structured to maximize viewership of Pac-10 games throughout these regions. To achieve that goal, time period exclusivity provisions are included in the Pac-10's agreements, and, undeniably, they will on occasion make it difficult or impossible for particular local broadcasters to produce and telecast live particular games involving Pac-10 teams. But the legal question, as always, is whether the net effect of these agreements increases or decreases output throughout the broad markets in which the restraints operate. Pac-10's Brief at 17-20. Answering that question involves a tradeoff between localized "output restrictions" and marketwide "increases in output," with the ultimate question being whether aggregate viewership of Pac-10 games has increased or decreased as a result of these agreements.[12]

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[12] Plaintiff tries to sidestep this analysis by claiming that Fresno is the relevant market, and hence, by definition, reducing broadcasts of games with local interest reduces marketwide output. This is wrong for at least two reasons. First, even if Fresno is the relevant market, the question remains whether there would be higher or lower aggregate viewership if the challenged contracts did not exist. Plaintiff has not offered an answer to this question. It simply assumes, without any proof, that consumers would have all the choices they have today plus KMPH's broadcasts of FSU games, and that would increase viewership. But neither conclusion is self-evident. Viewers may well have fewer choices of "national" games, resulting in less choice and lower viewership. Second, plaintiff's Fresno market argument is blatant bootstrapping,

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Plaintiff has not even ventured an answer to this question, relying instead on the mantra that local broadcast opportunities have been thwarted. See Mueller Decl. ¶ 23 ("Since the exclusivity provisions of these contracts prevent a significant number of games from being televised, they result in a significant reduction in output.")[13] But that approach fails to meet plaintiff's burden of coming forward with probative evidence that the Pac-10's agreements have appreciably restrained competition throughout the market.[14] Indeed, it merely confirms that what Pappas is complaining about is an injury to itself, rather than to competition, which is not cognizable under the antitrust laws. Pac-10's Brief at 18-20.

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and nothing less than an attempt to define the market by reference to the desired outcome in the case. It is undisputed that the Pac-10 operates over a much broader region than the Fresno ADI; that its football games are telecast over broad regions; and that it competes for rights fees and viewership with consortia of colleges and universities throughout the nation. A Fresno only market is, in this context, absurd. Pac-10's Brief at 20, n.11.

[13] A simple hypothetical illustrates the failure of plaintiff's analysis. Assume that under the present contracts, ABC televises in the Western region of the country a California-Stanford game that ten million people watch. The contract also precludes an FSU-OSU game, which 500,000 people in the Fresno area would watch, from being shown. Without the exclusivity provisions, as plaintiff admits (Opp. Brief at 9), ABC would not contract for Pac-10 games. Thus, the FSU-OSU game would be shown in Fresno, and the Cal-Stanford game might be shown by a local station in the San Francisco Bay Area, to an audience of 500,000. A few more Pac-10 games might be shown to local audiences of comparable size in a few more local areas. Pappas would argue, automatically, that output had increased absent the exclusivity provision, because more games were shown. However, that argument ignores the fact that millions fewer viewers watched college football, and advertisers reached much smaller audiences. Both output and consumer welfare actually declined as a result of the elimination of the contracts that permitted the Pac-10 to reach a broader audience. Pappas' failure to consider these aggregate output effects is fatally flawed from an antitrust standpoint.

[14] And this is plaintiff's burden, not the Pac-10's. E.g., Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir.), cert. denied, 112 S.Ct. 617 (1991); Eichman v. Fotomat Corp., 880 F.2d 149, 161-63 (9th Cir. 1989). Pappas' unsupported assertion to the contrary (Opp. Brief at 26), is simply wrong.

A related flaw in plaintiff's argument is equating the dashed hopes of some local viewers to see local teams with the consumer injury that antitrust is designed to prevent. Antitrust does not guarantee every consumer or consumer group in a market that their unique product preferences will be satisfied. If a court were ever to rule that antitrust law provided such a guarantee, such that markets characterized by some level of consumer dissatisfaction with the available products were anticompetitive, there is probably no market for any product that could not be characterized as anticompetitive. The guarantee of antitrust is only for a sort of "rough justice" in the form of a reasonable mix of products and services that competition produces; for example, 56 hours of live college football broadcast on the two Saturdays at issue in this case. Thus, merely stating that some viewers in a particular locality, or even a collection of localities, didn't get to see the games of their choice, does not mean there has been a consumer injury protected by antitrust law. Pac-10's Brief at 24-25. As with plaintiff's misguided "output" argument, it doesn't even begin the analysis required by antitrust law.

Of course, behind all the linear regressions and economic doublespeak, what Pappas is really saying is that consumers have been denied the benefits of Pappas and the games it would televise but for these agreements. In antitrust analysis, that simply doesn't count. As has been said countless times, the antitrust laws protect competition, not competitors. Pac-10's Brief at 18-20. Thus, even if the Pac-10's contracts have "virtually eliminated broadcast opportunities for local broadcasters" (Opp. Brief at 25:12-13 (emphasis added)), and caused a "decline in the number of Pac-10/Big 10 games available at the lowest tier of free over the air broadcast" (Opp. Brief at 26:7-8 (emphasis added)), it would not support plaintiff's claims.

2. No Evidence Supports Plaintiff's Argument that the Pac-10 Could Have the Benefits of Its Current Agreements Without Time Period Exclusivity.

Plaintiff and its expert argue at length that the time period exclusivity provisions of the Pac-10's agreements are unnecessary to realizing the other benefits of those agreements. That is true in a sense: if broadcasters would buy the Pac-10's package of rights without exclusivity guarantees, the Pac-10 would walk away happy. But plaintiff completely misses the point: time period exclusivity is not the Pac-10's idea, but is rather required by broadcasters. Accordingly, the Pac-10 would not enjoy any of the benefits of its agreements if it refused to provide exclusivity, because it would have no agreements.

Ironically, plaintiff admits the foundation for this conclusion: the fact that broadcasters (ABC, PTN, ESPN, etc.) demand time period exclusivity and will not contract for games without it. Opp. Brief at 9; Mueller Decl. ¶ 21. Given this concession, it is disingenuous for plaintiff to argue that none of the Pac-10's reasons for contracting as a conference require exclusivity.[15] What plaintiff should have provided is

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[15] The Pac-10's expert, Professor Ordover, never claimed that the Pac-10 couldn't create a portfolio of games, save on transaction costs, or obtain exposure for lesser known schools without time period exclusivity. Rather, he testified that those were legitimate reasons for joint contracting in general, a point plaintiff's expert concedes. Mueller Decl. ¶ 38. The justification for time period exclusivity identified by Dr. Ordover was the need of the broadcaster to protect its investment in Pac-10 football by not permitting the Pac-10 to offer the next best game in head-to-head competition with the game the broadcaster chose to televise.

Pappas similarly confuses the interests of the Pac-10 and of broadcasters with its claim that the Pac-10 has conspired with the defendant telecasters to "limit competition" "in the broadcasting or cablecasting of Pac-10 games." Opp. Brief at 22. Why would the Pac-10, a seller of those rights, ever do that? It would hardly be interested in furthering the alleged monopsony power of the buyers, which would most likely be used against the Pac-10. Cf. Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 211 (9th Cir. 1987) (on summary judgment, rejecting as "illogical" the inference that a purchaser acted with intent to restrict competition in the seller's market); Genetic Systems Corp. v. Abbott Laboratories, 691 F. Supp. 407, 422 (D.D.C.

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evidence that broadcasters have no legitimate need for exclusivity. Plaintiff provided no evidence of the kind -- with fatal consequences. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1469 (9th Cir. 1986) (summary judgment proper where plaintiff "failed to come forward with specific factual support to overcome Apple's asserted independent business justifications"); Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987) (once defendant presents a "plausible and justifiable reason for its conduct," failure on plaintiff's part "to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant"); Houser v. Fox Theatres Management Corp., 845 F.2d 1225, 1231 (3d Cir. 1988) (defendant's failure to present evidence to rebut "legitimate competitive purpose" supports summary judgment).

III. CONCLUSION

This lawsuit advances a political agenda, not viable legal claims. Plaintiff chose the wrong forum. Let it go to Congress, or to the FCC, but not to trial. Each of plaintiff's claims is defective as a matter of law, and each should be dismissed.

DATED: February 25, 1994

McCUTCHEN, DOYLE, BROWN & ENENSEN

By: _____
John N. Hauser
Attorneys for Defendant
The Pacific-10 Conference

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1988) ("that a purchaser . . . would conspire with a supplier . . . to facilitate the supplier's monopolization . . . is sufficiently implausible to limit any inference of an antitrust violation"); see also Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984), (it is "utterly implausible" to assume that buyer would conspire with seller to accept a predatory bid; on motion to dismiss, "the court is not required to don blinders and to ignore commercial reality"), cert. denied, 470 U.S. 1054 (1985).

PROOF OF SERVICE

I am a citizen of the United States, over 18 years of age, not a party to this action and employed in San Francisco, California at Three Embarcadero Center, 28th Floor, San Francisco, California 94111-4066 in the office of an attorney licensed to practice before this court and under whose direction this service was made. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

Today I served the attached:

REPLY MEMORANDUM IN SUPPORT OF THE PACIFIC-10 CONFERENCE'S SUMMARY JUDGMENT MOTION

by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 26, 1994.

Pamela A. Cobb